

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**





77-7043

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

HECTOR CRUZ, MATTHEW GULLEY, CARMINE  
PERRELLI, GEORGE DUNLEAVY, LOUIS  
POVEROMO, NICHOLAS PECHAR, and GEORGE  
MITCHELL, individually and on behalf  
of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD, individually and in his  
capacity as Commissioner of the New  
York State Department of Correctional  
Services; VITO M. TERNULLO, individually  
and in his capacity as Director of  
Matteawan State Hospital; LAWRENCE  
SWEENEY, individually and in his capa-  
city as Chief of Psychiatric Services  
at Matteawan State Hospital,

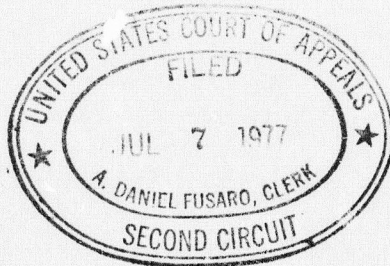
Defendants-Appellants.

---

Docket No.

77-7043

APPELLEES' PETITION FOR REHEARING EN BANC



JANE E. BLOOM  
MICHAEL KOLB  
Attorneys for Plaintiffs-Appellees  
MID-HUDSON LEGAL SERVICES, INC.  
50 Market Street  
Poughkeepsie, New York 12601  
(914) 452-7911



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

HECTOR CRUZ, MATTHEW GULLEY, CARMINE  
PERRELLI, GEORGE DUNLEAVY, LOUIS  
POVEROMO, NICHOLAS PECHAR, and GEORGE  
MITCHELL, individually and on behalf  
of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

Docket No.

BENJAMIN WARD, individually and in his  
capacity as Commissioner of the New York  
State Department of Correctional Services;  
VITO M. TERNULLO, individually and in his  
capacity as Director of Matteawan State  
Hospital; LAWRENCE SWEENEY, individually  
and in his capacity as Chief of Psychiatric  
Services at Matteawan State Hospital,

77-7043

Defendants-Appellants.

---

APPELLEES' PETITION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules  
of Appellate Procedure, plaintiffs-appellees Cruz, Gulley,  
Perrelli, Dunleavy, Poveromo, Pechar, and Mitchell hereby  
petition this Court for rehearing and reconsideration of its  
decision entered June 23, 1977, reversing an order of the  
District Court for the Southern District of New York. Plaintiffs  
respectfully suggest that this matter be reheard en banc inas-  
much as the original decision rendered by the majority of a



panel of this Court (Lumbard and Van Graafeiland, J J., Kaufman, C.J. dissenting), was premised upon errors of law and fact which place it in direct conflict with the law of this Circuit. This matter concerns legal principles of exceptional importance in the development of mental health as well as prison law. Moreover, the majority of the panel has erroneously engaged in appellate fact-finding, specifically proscribed by Rule 52(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiffs brought this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343 seeking to have the punitive transfer of mentally ill inmates from Matteawan State Hospital (hereinafter Matteawan) to prison without their consent or prior hearing declared invalid and enjoined. Plaintiffs also sought damages. The United States District Court for the Southern District of New York (Goettel, J.) held, after a trial to the court, that defendants violated the Constitution and New York Correction Law §408 by returning plaintiffs from Matteawan to prison for punitive and non-medical reasons and with no procedural safeguards antecedent to the terminations of treatment. The District Court found that mentally ill inmates at Matteawan have a right to treatment under New York law and due process protections must attach before this right is terminated and inmates are returned to prison. The District Court ordered



the defendants to construct an administrative process for the return of inmates to prison. The District Court decided that this process must include at a minimum the following:

"written notification to the inmate of the transfer decision and its factual basis; identification of the decision makers; ending the use of the treatment staff as sole decision makers; and some type of professional review which will be free from administrative pressures".  
424 F. Supp. 1277, 86 (S.D.N.Y. 1976)

(The decision of the District Court is attached hereto as Exhibit A.)

This Court reversed the District Court's decision and order, and dismissed the complaint. In its decision (the Slip opinion is attached hereto as Exhibit B), the panel majority disagreed with the District Court's finding that plaintiffs were returned from Matteawan to prison for punitive and non-medical reasons. The panel purportedly distinguished this Court's decision in United States ex rel. Schuster v. Herold, 410 F. 2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969) as being limited to proceedings to commit persons to mental institutions.

Judge Kaufman dissented in an opinion which demonstrates that the majority opinion is based on false premises and is inconsistent with the law of this Circuit.

GROUND FOR REHEARING

Plaintiffs respectfully urge that this appeal be reheard en banc for the following reasons:



1. This appeal involves questions of exceptional importance. The majority of the panel held that federal courts may not interfere with the professional judgment of psychiatrists by constructing procedural due process protections for mentally ill patients who are being returned from a mental institution to prison. The legal principles presented by this appeal and decision have implications beyond the facts of this case as they affect mentally ill patients and prisoners generally.

2. The majority of the panel has taken a position squarely in conflict with other cases in this Circuit delineating the due process rights of prisoners and mental patients.

3. In violation of Rule 52(a) F.R. Civ. P., without holding that Judge Goettel's findings of fact were "clearly erroneous", the majority of the panel substituted its own factual findings. Not only was this impermissible, but the majority's determination is without justification in the record.

I. THIS APPEAL INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE

There are several important legal principles that form the basis for the majority panel's decision. First, the panel decided that "The nature of the medical judgments involved in this case and the context in which they are made render them peculiarly unsuited to procedural structuring by a court." (Slip. op. at 4405) Secondly, the panel found that a statement of reasons for the transfer decision was not needed because ". . . too much concern about precedent may interfere with the effective exercise of administrative and medical discretion." (Slip. op. at 4406)



Finally, the majority held that the District Court erred in finding that inmates are entitled to notice of the impending transfer because ". . . the pros and cons of notice policy are a subject that is better left to the judgment of the doctors at the hospital." (Slip. op. at 4407)

These principles relating to the degree of deference federal courts should give to psychiatric judgments are of significant importance. These principles may have application to a wide variety of contexts involving prisoners as well as mental patients receiving in-patient or out-patient treatment. Rehearing en banc is required here as this case " . . . involves an issue likely to affect many other cases . . ." and "presents an issue of sufficient concern to enough litigants who are or may become involved in similar situations so that the even-handed administration of justice will be benefited by a decision by the entire court." Walters v. Moore-McCormack Lines, Inc., 312 F. 2d 893, 94 (2d Cir. 1963)(en banc).

II. THIS DECISION CONFLICTS WITH OTHER CASES IN THIS CIRCUIT  
DELINEATING THE DUE PROCESS RIGHTS OF PRISONERS.

In seeking a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution," Wolff v. McDonnell, 418 U.S. 539, 556 (1974), this Court has consistently required that minimal procedural protections be applied when inmates are subjected to substantial deprivations and when institutional safety is not thereby threatened. In the face of a record which outlines the "shocking practices" (Slip. op. at 4414) utilized in the return of patients from Matteawan to prison (see supra at p.9 ) and which contains no evidence to indicate that the



minimal procedural protections required by the District Court or suggested in Judge Kaufman's dissenting opinion will interfere with therapeutic or security concerns at Matteawan\*, the majority panel has decided that no procedural protections are required. This conclusion conflicts with the law of due process as developed in this Circuit.

In United States ex rel. Schuster v. Herold, 410 F. 2d 1071, 1073 (2d Cir.), cert. denied, 396 U.S. 847 (1969), this Court recognized that "As great strides in psychiatric knowledge have been paralleled by evolving concepts of due process, human procedures for the commitment and treatment of the mentally ill have replaced snake pits and witch hunts". This Court held that the decisions of physicians and psychiatrists to commit and retain mentally ill prisoners in state mental institutions were to be made in conformity with the requirements of procedural due process. The due process procedures required by this Court included in part the right to notice, examination by two independent physicians, a hearing, and periodic reviews of the need for further confinement. In rejecting Judge Goettel's conclusion that minimal procedural safeguards are required prior to the termination of treatment, the panel majority ignored the decision and underlying assumption in Schuster that psychiatric decisions are not immune

---

\* Indeed Judge Kaufman noted that one of the staff physicians testified that "... only a uniform 'manual of procedures' will prevent further proliferation of the 'slipshod' practices." (Slip. op. at 4414) He also noted that Dr. Jack Wright, the Assistant Commissioner for the New York State Department of Mental Hygiene, testified that "... it is possible to articulate acceptable and reasonably objective decertifications factors." (Slip. op. at 4415)



from judicial review. See also O'Connor v. Donaldson, 422 U.S. 567 (1975). While the panel majority distinguishes Schuster on the ground that the case dealt with commitment procedures and "here the patient has been subject to protracted observation by the hospital treatment staff", Schuster clearly applied to commitment and retention decisions.

The majority panel's conclusion that a statement of reasons is not required because ". . . too much concern about precedent may interfere with the effective exercise of administrative and medical discretion." (Slip. op. at 4406) is also in direct conflict with this Court's decisions regarding the rights of prisoners to due process notice. A written statement of reasons for action has been held to be an elemental requirement of due process. In Haymes v. Regan, 525 F. 2d 540, 544 (2d Cir. 1975) this Court noted that a statement of reasons serves ". . . to protect the inmate from arbitrary and capricious decisions or actions grounded upon impermissible considerations." Other cases in this Circuit have consistently affirmed this view. See United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F. 2d 925 (2d Cir.) vacated and remanded as moot sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974); Zurak v. Regan, 550 F. 2d 86 (2d Cir. 1977); Holup v. Gates, 544 F. 2d 82 (2d Cir. 1976). The majority panel is not consistent with these cases.

While the majority acknowledged that transfer here often entailed placement in segregation strip cells (Slip. op. at 4401), minimal due process such as notice, a written record of the transfer



decisions and guidelines for the transfer decision was not required because these are subjects "better left to the judgment of the doctors at the hospital". (Slip. op. at 4407) These minimal elements of due process have consistently been required by this Circuit when inmates are placed in strip cells and segregation. See Cunningham v. Ward, 546 F. 2d 481 (2d Cir. 1976); Mawhinney v. Henderson, 542 F. 2d 1, 4 (2d Cir. 1976); Crooks v. Warne, 516 F. 2d 837 (2d Cir. 1976); United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir. 1975); Bloeth v. Montayne, 514 F. 2d 1192 (2d Cir. 1975).

A rehearing en banc is required because this majority decision is not consistent with previous decisions in this Court.

III. THE MAJORITY OF THE PANEL SUBSTITUTED ITS OWN FACTUAL FINDINGS IN VIOLATION OF RULE 52(a) FEDERAL RULES OF CIVIL PROCEDURE

The panel majority, having failed to hold any of the District Court's findings "clearly erroneous", substituted its own fact-finding for that of the District Court in violation of a cardinal rule of appellate review. As stated by Chief Judge Kaufman in his panel dissent, "[t]he majority opinion all but ignores the factual findings of the district court." See Rule 52(a) Federal Rules of Civil Procedure; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); United States v. National Association of Real Estate Boards, 339 U.S. 485, 495-496 (1950); Coalition for Education in District One v. Board of Elections of City of New York, 495 F. 2d 1090, 1093 (2d Cir. 1974).



It should be noted that the "clearly erroneous" rule applies not only to findings of fact, but also to "factual inferences from undisputed basic facts". Coalition for Education, supra, at 1093. The panel majority improperly substituted its factual inferences for those of the District Court.

As a primary example, Judge Goettel found that plaintiffs' involvement in altercations with correctional officers was a factor which improperly entered into the hospital psychiatrists' decisions to transfer plaintiffs to prison. More specifically, Judge Goettel found it "very likely" that the decisions to transfer "were foregone conclusions in light of the plaintiffs' prior problems with correctional officers." 424 F. Supp. at 1285. In reaching this finding Judge Goettel effectively rejected the testimony of all the hospital psychiatrists, referred to by him at 424 F. Supp. 1282, that altercations with correctional officers had nothing to do with the decisions to transfer plaintiffs. Despite Judge Goettel's assessment of the psychiatrists' lack of credibility on this point, the panel majority concluded that "the record does not support a finding that transfer decisions have been made in bad faith, out of pique, or on irrational grounds." Slip. op. at 4404.

As a further example, Judge Goettel found as follows on the basis of the psychiatrists' testimony:



The doctors differed significantly among themselves as to the possibility and propriety of Matteawan treating neurotic or personality disorders . . . . Finally, there appeared to be few standards or objective guidance for the use of the staff personnel who must make transfer decisions. 424 F. Supp. at 1282-1283.

Without reference to these findings by Judge Goettel, the majority concluded that "the doctors testifying seemed to be in general agreement about the principal criteria [governing transfers]", Slip. op. at 4400, and that "the basic criteria [for transfer decisions] already being applied by the doctors seem fairly sound and uniform", Slip. op. at 4407.

Further, while Judge Goettel found that "[m]arked differences also appeared [among the psychiatrists who testified] as to . . . Dr. Sweeney's role and activity in transfer decisions", 424 F. Supp. at 1283, the panel majority concluded that "[i]f the evaluating psychiatrist recommends a return to prison, his report is reviewed by the hospital's Chief of Psychiatric Services, Dr. Lawrence Sweeney." Slip. op. at 4400. Dr. Sweeney's testimony appears to have been ignored by the panel. Dr. Sweeney stated "I don't give them any directions. They're all doctors. They're all qualified. They make up their own minds. It's their patients." (Tr. 261)

Finally, as indicated by Chief Judge Kaufman in his panel dissent, the panel majority ignored Judge Goettel's specific finding that

the facts presented do not support the conclusion that the terminations of treatment in the plaintiffs' individual cases were even substantially in compliance with the standard enunciated in Section 410 of the Correction Law. 424 F. Supp. at 1285.

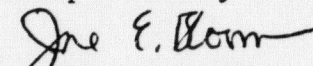


The findings of the panel majority may not properly be substituted for those of the District Court.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that this Court should reconsider its decision of June 23, 1977, and the appeal should be set for rehearing en banc.

Respectfully submitted,



JANE E. BLOOM

MICHAEL KOLB

Attorneys for Plaintiffs-Appellees

MID-HUDSON LEGAL SERVICES, INC.

50 Market Street

Poughkeepsie, New York 12601

(914) 452-7911

DATED: Poughkeepsie, New York  
July 7, 1977



# CRUZ v. WARD

1277

Cite as 424 F.Supp. 1277 (1976)

ing by this Court that Plaintiff set forth an adequate disclosure with no use of improper new matter.

## Reduction to Practice

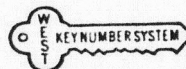
[9] Plaintiff claims and the Court so finds that he conceived and actually reduced his invention to practice before the filing date of Defendant's application. Plaintiff himself testified and the Court finds that a bumper sub was built in accordance with the teachings of Plaintiff's invention, sold to, and used successfully by Shell Oil Company prior to the filing date of Defendant's application. This is also corroborated in the depositions of Chester B. Falkner, Jr., PX-13 at 19-20, Charles R. Gurganus, PX-11 at 17-18, and Fines F. Martin, PX-35 at 8-10. The Court also makes these findings from the testimony of Joseph F. Woerner, and Defendants did not adequately refute any of this evidence. Rather, Defendants claim that Plaintiffs should not be allowed to introduce this evidence of actual reduction to practice because it was allegedly not before the Board.

[10] This Court had occasion in a prior order in this case to rule on the admissibility of evidence relating to issues before the Board. *Shaffer Tool Works v. Joy Manufacturing Co.*, 388 F.Supp. 536 (S.D.Tex. 1974). "[T]he evidence before the district court may only relate to those issues presented to the Board of Patent Interferences, even though the evidence is new, but evidence withheld from the Board is generally inadmissible in the district court." *Id.* at 538 (citations omitted). In accordance with that ruling this Court is now in a position to state "whether or not the issue of Walker's actual reduction to practice was ever before the Board," *Id.*, and the Court finds that such evidence was indeed before the Board. Plaintiffs did not conceal or suppress evidence, and certain instruments involved in the Public Use Proceeding were before the Board as shown by receipt stamps. PX-16. The Board had this information before it and erred in not finding that Plaintiff had conceived and reduced his invention to practice. While Plaintiffs

state that the issue of public use and reduction to practice were not focused on before the Board, the Court finds that these issues were at least available to the Board for consideration, and this Court is exercising its discretion to hear them in this forum. *Standard Oil Co. v. Montedison, S. p. A.*, 540 F.2d 611, 617 (3d Cir. 1976). Therefore, the evidence was admissible in this Court and Defendants' Motion to Strike Testimony should be and hereby is denied.

In conclusion, the Court is of the opinion that the Board of Patent Interferences was correct in awarding Claims 1-3 to Plaintiffs and was in error in awarding Claim 4 to Defendants, that the opinion of the Board should be accordingly affirmed in part and reversed in part, and that a Final Judgment so stating should be issued by this Court.

The Clerk shall file this Memorandum Opinion and provide all parties with a true copy.



Hecto: CRUZ et al., Plaintiffs,

v.

Benjamin WARD, Individually and in his capacity as Commissioner of the New York State Department of Correctional Services, et al., Defendants.

No. 75 Civ. 5334 (GLG).

United States District Court,  
S. D. New York.

Dec. 17, 1976.

Action was brought by state prison inmates to enjoin their transfer from state mental hospital to general prison system without prior hearing. The District Court, Goettel, J., held that state right to treatment for mentally ill inmates was being arbitrarily abrogated and safeguards pro-

EXHIBIT A



vided were not minimally satisfactory under due process clause of Fourteenth Amendment, and that defendants would therefore be afforded opportunity to construct administrative process for transfers that was in keeping with fundamentals of due process clause.

Ordered accordingly.

#### 1. Constitutional Law ⇐ 272

Where state law protects individual prison inmate from grievous loss, due process clause still requires minimum due process protections so that state-created right is not arbitrarily abrogated and it remains function of federal courts to insure that state promulgated protections for state-conferred rights are minimally sufficient. U.S.C.A.Const. Amend. 14.

#### 2. Civil Rights ⇐ 13.9

Exhaustion of state remedies was not prerequisite to state prison inmates' civil rights action to enjoin their transfer from state mental hospital to general prison system without prior hearing. 42 U.S.C.A. § 1983.

#### 3. Federal Courts ⇐ 50

While right of mentally ill inmate to treatment is not explicitly set forth by relevant New York statutes, it was sufficiently explicated by state case law so that abstention was not required in action by state prison inmates to enjoin their transfer from state mental hospital to general prison system without prior hearing. CPLR N.Y. 7801 et seq.; Correction Law N.Y. § 400 et seq.; 42 U.S.C.A. § 1983.

#### 4. Constitutional Law ⇐ 272

In view of, *inter alia*, lack of showing of any procedural safeguards whatever antecedent to termination of treatment of prison inmates at state mental hospital and fact that terminations in individual cases were not even substantively in compliance with statutorily enunciated standard, manner in which transfers of inmates to general prison system had been handled sufficiently demonstrated that state right to treatment for mentally ill inmates, as recognized and

mandated by statute and case law, was being arbitrarily abrogated and that safeguards provided were not minimally satisfactory under due process clause. Correction Law N.Y. §§ 408, 410; U.S.C.A.Const. Amend. 14.

#### 5. Constitutional Law 272

##### Mental Health ⇐ 436

Defendants in state prison inmates' action to enjoin their transfer from state mental hospital to general prison system without prior hearing would be afforded opportunity to construct administrative process, including at a minimum written notification to inmate of transfer decision and its factual basis, identification of decision makers, end of use of treating staff as sole decision makers, and some type of professional review free from administrative pressures, that was in keeping with fundamentals of due process clause. U.S.C.A. Const. Amend. 14; Correction Law N.Y. §§ 408, 410.

Mid Hudson Valley Legal Services Project, Poughkeepsie, N. Y., for plaintiffs; by Jane E. Bloom, Poughkeepsie, N. Y., of counsel.

Louis J. Lefkowitz, Atty. Gen., New York City, for defendants New York State Department of Law; by Arlene Silverman, New York City, of counsel.

#### OPINION

GOETTEL, District Judge.

On October 28, 1975, plaintiffs Cruz, Guley and Perrelli, inmates in the New York State prison system, commenced an action under the provisions of 42 U.S.C. § 1983 to enjoin defendant officials of the New York State Department of Corrections and Matteawan State Hospital from transferring them from Matteawan to the general prison system without a hearing prior to transfer. Plaintiffs allege, *inter alia*, that these transfers were punishments imposed on them because of their having caused trouble in the hospital. On November 11, 1975, an order to show cause was issued on plain-

EXHIBIT A



tiff's motion for a preliminary injunction. On December 15, 1975, plaintiffs Dunleavy, Poveromo, Pechar and Mitchell intervened as party plaintiffs.

Hearings at Matteawan on December 30, 1975, January 27, and March 8, 1976 and in New York City on March 10, 1976<sup>1</sup> established the following facts. Plaintiff, Hector Cruz, while serving a life sentence at Attica Correctional Facility, was placed in segregation in 1973. After an attempted suicide in December, 1973, he was transferred to the Diagnostic and Evaluation Center at Fishkill Correctional Facility. On January 4, 1974, Cruz was admitted to Matteawan under the provisions of Article 16 of the New York Correction Law with a diagnosis of "Schizophrenia, residual type". Cruz's treatment at Matteawan included prescriptive medication, twice weekly consultations with a psychologist, and monthly psychiatric evaluations. Cruz was placed in an open ward custody setting. In May, 1974, Cruz apparently became actively hostile toward others in the hospital. As his treatment records note, he agreed with correctional officers that "the next time he [was] involved in any physical violence he will ask for a transfer". On August 27, 1974, Cruz was, at his own request, transferred to Clinton Correctional Facility. After only two weeks in confinement (without treatment or medication) he was again sent to the Diagnostic and Evaluation unit at Matteawan. Five weeks later Cruz was admitted to the hospital again, with a diagnosis of schizophrenia with aggressive features. From October 30, 1974, through September 17, 1975, Cruz's pattern of treatment resumed, again interspersed with several reports of altercations with members of the hospital community. An evaluation by a staff psychiatrist on September 17, 1975 noted:

"... the patient needs further hospitalization because he has poor self-control, immature and appeared to be unpredictable in his behavior."

1. These hearings were held before the writer when a U. S. Magistrate. The case was re-

On October 17, 1975, Cruz was involved in a fight in his ward (which apparently also involved some of the other plaintiffs). Three days later he was evaluated by a panel of six psychiatrists. This evaluation was not a usual hospital routine and its use in this case was not explained. Based upon this evaluation, Cruz was determined to have "recovered" from his mental illness and was ordered transferred out of Matteawan although his final diagnosis was schizophrenia, residual type.

Plaintiff, Matthew Gulley, was confined at Attica beginning in 1968 under a sentence of ten years. While in segregation at Attica, Gulley became depressed, was beset by hallucinations and made several attempts at suicide. On December 1, 1973, he was transferred to the Matteawan Diagnostic and Evaluation unit. On January 28, 1974, he was admitted to Matteawan with a diagnosis of unspecified psychosis and borderline mental retardation. An early psychiatric evaluation noted a tendency toward "episodic outbursts of aggressive behavior". Gulley's status and treatment at Matteawan included medication, psychological counselling, monthly psychiatric evaluations and open ward confinement. Throughout his confinement at Matteawan Gulley was felt by authorities to be a discipline problem. In January, 1975, he was involved in a fight in his ward and the next psychiatric evaluation note, entered on February 11, 1975, indicated the physician's conclusion that a return to prison might be necessary if the violence persisted. On the same day Gulley was transferred to the jail ward and was placed in a restraining sheet. On February 13th and 14th, he was evaluated by defendant, Lawrence Sweeney, the Chief of Psychiatry at Matteawan. Dr. Sweeney attributed the plaintiff's actions to alcohol and diagnosed Gulley as having a divided character with depressive features. After the interview Gulley was sent, without notice, to Clinton Correctional Facility where he was confined from February 25 to March 11, 1975. This confinement was marked by

signed for all purposes after appointment to the District Court.

EXHIBIT A



an almost complete absence of professional assistance and the total absence of medication.

After only two weeks at Clinton, prison authorities ordered Gulley returned directly to the hospital population at Matteawan. Once there, Gulley's treatment resumed on substantially the same terms as before his transfer. In July, 1975, a retention order under the provisions of Section 408 of the New York Correction Law was obtained for Gulley by the defendants. In the October 9, 1975 periodic evaluation, a staff psychiatrist made a recommendation for further retention of Gulley due to his fear of prison and unpredictable behavior, notwithstanding the psychiatrist's acknowledgment of the absence of any psychosis. On October 17, 1975, Gulley was involved in a fight in the ward and was once again placed in a restraining sheet in the jail ward. Three days later Gulley was found to be well and was sent to the Transfer unit for prison reassignment.

On April 25, 1974, George Dunleavy, having been in confinement at Greenhaven Correctional Facility, was determined to be a mentally ill person in need of treatment and was sent to the Diagnostic and Evaluation unit at Matteawan. On June 11, 1974, Dunleavy was diagnosed as a chronic schizophrenic with an anti-social personality and episodic drunkenness. The course of treatment Dunleavy received while hospitalized was substantially similar to that received by Cruz and Gulley. On December 19, 1974, a twelve-month retention order under the provisions of Correction Law § 408 was obtained by the defendants on Dunleavy. Dr. Ali Sirman, a Matteawan staff psychiatrist, acknowledged that neither during the period of the § 408 retention nor subsequently was Dunleavy, in his opinion, ever mentally ill. Dr. Sirman further testified that Dunleavy was merely neurotic and had difficulties in prison but was retained at Matteawan because he was helpful to the staff and had a rapport with the other prisoners. On March 16, 1975, Dunleavy was accused of attempting to escape from the hospital. In a periodic evaluation on

April 23, 1975, Dunleavy was diagnosed as a chronic undifferentiated schizophrenic without psychosis and, shortly thereafter, was transferred back to prison. After four weeks in Greenhaven, Dunleavy attempted suicide by slashing his wrists, was transferred to the hospital, and then to Matteawan, diagnosed as an episodic schizophrenic with a personality disorder leading to anti-social behavior. The staff psychologist at Matteawan testified that Dunleavy's condition before and after this transfer was substantially unchanged. In November, 1975, a § 408 retention application was made on Dunleavy and, although staff psychiatrists indicate he is not psychotic, he remains at Matteawan.

Louis Poveromo was incarcerated at Greenhaven when, in September, 1974, he was determined to be a mentally ill person in need of treatment and was transferred to Matteawan. He was diagnosed as psychotic and drug dependent. His treatment was similar to that received by the other plaintiffs. In mid-January a § 408 retention order was requested by the hospital and granted by the court. Late in January, 1975, however, Poveromo was involved in a fight with correctional officers and was immediately thereafter evaluated by a staff psychiatrist who diagnosed Poveromo as a "troublemaker" for whom Matteawan had "no more to offer". The doctor "prescribed" transfer to a correctional institution. After this evaluation Poveromo was immediately pronounced cured and sent to Clinton prison. There Poveromo was continuously kept in a stripped cell under observation. After one month of such observation Poveromo was returned to Matteawan diagnosed as being anti-social and having a personality disorder.

George Mitchell, while confined in a segregation cell at Attica, began to hear voices and see visions in June, 1974. Three months later he was transferred under § 408 to Matteawan where he was diagnosed as having an unspecified psychosis and a personality defect. After a month at Matteawan, at his own request Mitchell was returned to prison. After several weeks at

EXHIBIT A



Clinton Mitchell was again sent to Matteawan where, for six months, his treatment paralleled that of the other plaintiffs. In July, 1975, Mitchell was voluntarily transferred to the jail ward at Matteawan because of his fear of doing violence to himself or others. On October 10, 1975, Mitchell was evaluated by a staff psychiatrist who diagnosed him as recovered but bearing a "residual" amount of schizophrenia. Mitchell was not told of the psychiatrist's conclusions or of his recommendation that Mitchell be returned to prison. When later told of the decision by a correctional officer who was involved in his transfer, Mitchell, in the words of a staff psychiatrist, "went berserk" and was taken to the transfer unit in a strait jacket. While at the transfer unit Mitchell attempted suicide several times but was nevertheless transferred to Clinton prison. After two weeks at Clinton prison authorities again returned Mitchell to Matteawan, under the provisions of § 408, where he now remains.

Martin Ogulnick, a staff psychologist at Matteawan, testified that there were no set times for patient evaluations by the hospital psychiatrists, that the evaluations would occur at intervals of from two to three weeks to four months and would last from two to twenty minutes. Mr. Ogulnick testified that he had been working with both Dunleavy and Mitchell and that, in his opinion, neither should have been returned to prison. He acknowledged that different members of the Matteawan staff had different criteria for treatment and retention decisions. Mr. Ogulnick opined that neuroses were treatable at Matteawan.

Dr. Sweeney, Chief of Psychiatric Services at Matteawan, testified at length on the relative differences in the custodial conditions between the correctional facilities and Matteawan and concluded that a major attraction of the hospital was that it represented an easier "bit" for the inmate than prison. Dr. Sweeney acknowledged that before an inmate can be committed to Matteawan he must be examined by two disinterested physicians and their report must be approved by a state judge. Dr. Sweeney

stated that these evaluations included reviews of the prison and medical files of the inmate, as well as personal evaluations by the physicians. Dr. Sweeney acknowledged that his staff's diagnoses do not always agree with such outside physicians' conclusions, but opined that these discrepancies were due to the outside professionals' lack of personal familiarity with the patients. Dr. Sweeney inferred that his staff was better able to detect malingering and shamming than outside professionals. He testified that evaluations were conducted on a regular four-to-six week schedule. Dr. Sweeney stated that a patient would not be retained if he did not have a treatable psychosis, yet acknowledged that patients with neurotic disorders were retained if the hospital budget permitted. He had set up a separate ward for the aggressive "acting out" patients so that, in Dr. Sweeney's words, they were "putting all the dynamite in one box". Dr. Sweeney acknowledged that four of the seven psychiatrists on his staff were not licensed for private practice in New York and that neither he nor any of his psychiatrists were board certified in psychiatry. He denied that any of the plaintiffs' transfers were related to their altercations with correctional personnel, although acknowledging that such incidents could lead to reevaluations of status.

Dr. Ali Sirman testified that he was the psychiatrist in charge of the unit responsible for certifying patients back to prison. He described the standard he applied to be whether the patient has "a contact with reality, is he competent, does he know what he is doing". Dr. Sirman acknowledged that there are neither written nor oral standards for his decisions as to retention or transfer and that he would retain a neurotic who was having difficulty functioning if the hospital condition permitted it. Dr. Sirman described the conditions of the several plaintiffs as either anti-social personalities or personality disorders with manipulative characteristics. He denied that any pressure from the guards induced his transfer decisions or that any of the disorders of the plaintiffs were treatable at Matteawan.

EXHIBIT A



Dr. Sirman testified that the examination schedule was totally random and that a psychiatrist may not see a given patient for a year or more after an evaluation. Dr. Sirman explained the presence of Dunleavy as one who assisted the administration and was retained despite an absence of illness. He stated that once such a patient ceases to be an aid to the hospital staff the reason for his retention disappears and he should be returned to prison. Dr. Sirman further acknowledged that other non-psychotics were retained at Matteawan.

Dr. Factora testified that he was on the staff at Matteawan and performed the October 9, 1975 evaluation of Gulley and recommended retention. Dr. Factora denied that Dr. Sweeney ever questioned his retention recommendations. (Dr. Sweeney testified that he had so questioned Dr. Factora's recommendations.) Dr. Factora testified that, contrary to the opinions expressed by other psychiatrists, personality disorders were treatable at Matteawan. He admitted that he had diagnosed Gulley as being in need of treatment on October 9, 1975, but well enough to be transferred on October 20, 1975. Dr. Factora stated that his change of mind was due to the occurrence of a group psychiatric evaluation on the later date wherein Gulley was properly diagnosed as recovered, but that as of November, 1975, he would agree that Mitchell was again in need of hospitalization. Dr. Factora acknowledged that he had, on earlier occasions, acceded to Gulley's fear of prison and recommended retention. He described Gulley's claim that he was hearing voices and his suicide attempts as manipulative actions designed to insure retention at Matteawan. This witness also stated that Mitchell may have been on therapeutic drugs when the transfer decision was made and that he had no way of knowing whether the termination of medication would induce a relapse.

2. While both Dr. Cakir (whose native language is Turkish) and Hector Cruz (who speaks Spanish) testified in English with some difficulty, Dr. Cakir denied having any problems treating Cruz.

Dr. Atilla Cakir testified that he had been a staff psychiatrist at Matteawan for more than nine years and was licensed to practice medicine and psychiatry in Turkey (but not in New York).<sup>3</sup> Dr. Cakir was well aware of Cruz's record at Matteawan and concurred in the decision to return him to prison. Dr. Cakir described the process of evaluating a patient for transfer as a deep personal and delicate judgment. He felt that it depended on whether or not the patient was psychotic. Dr. Cakir did not believe that personality disorders could be treated at Matteawan. The doctor testified that he sought a group evaluation of Dunleavy due to Dunleavy's ability to manipulate and sham, which led the doctor to seek the opinions of other psychiatrists before he recommended transfer.

Dr. Seymour Feldman testified that he was a staff psychiatrist at Matteawan and was licensed by New York in psychiatry. Dr. Feldman testified that he would not return a patient to prison without first lowering the dosages of medication required, which some other doctors had done. Dr. Feldman disagreed with the policy of keeping all aggressive patients in one ward and opined that neither a patient's enunciated wishes nor the fact that he had been in fights should be considered as part of the decision concerning continuation of treatment. Dr. Feldman also acknowledged that both Matteawan and the prison medical staffs are susceptible to "passing the buck" as a method of disposing of extraordinarily difficult cases.

All the psychiatrists denied that the ward altercations or the escape attempt had anything to do with the transfer decisions in plaintiffs' cases. There was also a general agreement that a serious psychosis could not be cured but, at best, the patient experiences a state of remission.<sup>4</sup> The doctors differed significantly among themselves as to the possibility and propriety of Matteaw-

3. While plaintiffs argue that they have a right to remain at Matteawan until they have "recovered", this would appear to be impossible medically.

EXHIBIT A



an treating neurotic or personality disorders. Marked differences also appeared as to the causation and regularity of group evaluations and as to Dr. Sweeney's role and activity in transfer decisions. Finally, there appeared to be few standards or objective guidance for the use of the staff personnel who must make transfer decisions.

The Matteawan doctors had a curiously ambivalent attitude toward the aggressively assaultive conduct manifested by most of the plaintiffs in this action. While acknowledging that in extreme instances (a "Jack the Ripper" for instance) such behavior might be symptomatic of psychosis, they seemed to feel that, by and large, it was merely a "personality disorder" (psychopathic personality) and neither treatable nor warranting hospitalization. (Indeed, it was suggested that much of it was caused by homosexual rivalries induced by the open ward confinement situation.)

Whether this tolerant attitude toward aggression is well founded is a medical question that may take years to resolve. But from a prison administration standpoint, they are seemingly dealing with an insoluble dilemma. When a prison inmate continually assaults corrections officers and other prisoners, the prison officials have little difficulty in convincing the two certifying doctors that he is incompetent and in need of hospitalization. If he continues such behavior at Matteawan his status is reviewed and his acts are viewed as either a sign of his recovery, or at least not a psychotic symptom preventing his return to prison. He gets sent back to prison and the roundelay continues.

For the New York State prison inmate the right to treatment for mental illnesses incurred while in confinement is granted by Article 16 of the New York Correction Law. This Article details the situs of hospitalization to be Matteawan State Hospital and delineates the responsible officers and their powers and duties with respect to the mentally ill inmate. Of particular relevance to this case are § 408 and § 410 of the Correction Law. Section 408 provides an exten-

sive array of procedural due process protections for an inmate faced with a transfer to Matteawan. Notice, hearings, representation and review are all rights which must be available to an inmate before the decision to confine him at Matteawan may be carried into execution. Section 410, on the other hand, provides that the treatment of patients of Matteawan shall be terminated when they have "recovered" from their illnesses. These two sections have been recognized by the New York courts as mandating that the Department of Corrections provide treatment for individuals confined at Matteawan. See *Kesselbrenner v. Anonymous*, 39 A.D.2d 410, 334 N.Y.S.2d 738 (2d Dept., 1972), rev'd on other grounds, 33 N.Y.2d 161, 350 N.Y.S.2d 889, 305 N.E.2d 903 (1973). Furthermore, the Supreme Court has recently noted that a state prison system's deliberate denial of medical treatment to the convict may constitute a violation of the Eighth Amendment bar to cruel and unusual punishment. *Estelle v. Gamble*, — U.S. —, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

In *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not entitle a duly convicted state prisoner to a prior hearing in the face of an impending transfer from one correctional facility to another, absent a state law or procedure granting the inmate such a right. The Court declared that not every change in circumstances visited upon a prison inmate must be accompanied by procedural due process notwithstanding the substantially unfavorable impact of the change. In *Meachum* the respondent inmates had brought suit in the District Court protesting their transfer to less favorable prison facilities based upon administrative determinations of prison officials. The lower courts, relying on *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) and earlier cases, held that the inmates had a right to a prior hearing before transfer. The Supreme Court, however, reversed, explaining that the interest vindicated in *Wolff* was one based in state law

EXHIBIT A



and, therefore, the federal constitution (through the federal courts) could then be invoked to insure the presence of minimum procedural safeguards. In holding for the state authorities in *Meachum*, the Court explained that the inmates in that case could not point to a specific state law or procedure conditioning transfers upon the occurrence of specific events and, therefore, the inmates could not claim that any due process rights had been violated by transference without a hearing.

Counsel for defendants argues that *Meachum* limits *Wolff* and denies the mentally ill inmate any hearing right prior to termination of hospitalization by transfer from Matteawan to a correctional facility. However, the defendants' conclusion avoids the critical question established by *Meachum*—does the state law or procedures give the plaintiffs a right for which *Wolff* will require due process protections?

[1] *Meachum*, followed upon a number of cases, beginning with *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) and continuing through *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971) and *Wolff v. McDonnell*, *supra*, wherein the Supreme Court had enunciated the extent of the properly convicted person's continuing rights to due process of law. This line of cases represents the core of a growing body of law recognizing that the convicted criminal's forfeiture of his liberty by virtue of a just conviction is not synonymous with total forfeiture of all civil and human rights. To the extent that *Meachum* limits these holdings this Court reads the decision to require the complaining state inmate to base his suit upon an underlying right recognized by the state law rather than upon federal standards and rights. The Supreme Court, by *Meachum*, limits the role of the federal courts in prison administration but not in the review of a state's provision of procedural due process to the rights extant in the state's own law. Where a state law protects an individual inmate from grievous

loss, the Due Process Clause still requires that minimum due process protections are established so that the "state created right is not arbitrarily abrogated". *Meachum v. Fano*, *supra* at 226, 96 S.Ct. at 2539. It remains the function of the federal courts to insure that state promulgated protections for state conferred rights are minimally sufficient.

[2, 3] Plaintiffs have acknowledged that an action under Article 78 of the New York Civil Practice Law and Rules may be available for them. *Cf. Solari v. Vincent*, 46 A.D.2d 453, 363 N.Y.S.2d 332 (2d Dept., 1975)<sup>4</sup>; but *cf. Cummings v. Reagan*, 45 A.D.2d 415, 358 N.Y.S.2d 556 (3d Dept., 1974).<sup>5</sup> Yet they contend, and the defendants have not contested, that an exhaustion of their state remedies is not a prerequisite to the 42 U.S.C. § 1983 action. The Court agrees. *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). *Accord, Carr v. Thompson*, 384 F.Supp. 544 (W.D.N.Y. 1974). Furthermore, while the right of the mentally ill inmate to treatment is not explicitly set forth in Article 16 of the New York Correction Law, it is sufficiently explicated by the state case law to put to rest any question of the requirement of abstention by a district court under the doctrine enunciated in *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 82-5, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975) and *McNeese v. Board of Education for Community School District 187*, 373 U.S. 668, 673, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1967).

[4] New York's law, statutory and case, does recognize the right to treatment of the mentally ill inmate. The Appellate Division, Second Department, of the New York Supreme Court, in its opinion in *Kesselbrenner v. Anonymous*, *supra*, wrote:

We attach no significance to the omission of the word "treatment" in the mandate to the Department of Correction (Correction Law, § 400, subd. 1) to maintain hospitals for the mentally ill "solely for

4. *Reversed as moot*, 38 N.Y.2d 835, 382 N.Y.S.2d 48, 345 N.E.2d 591 (1976).

5. *Reversed as moot*, 36 N.Y.2d 969, 373 N.Y.S.2d 563, 335 N.E.2d 864 (1975).

EXHIBIT A



the purpose of holding in custody and caring for such mentally ill persons" (Emphasis added).

In our opinion, the word "care" as used therein includes and imports the "treatment" of such persons.

*Supra* 39 A.D.2d at 417, 334 N.Y.S.2d at 745.

While the New York State Court of Appeals reversed the holding in *Kesselbrenner*, it too was able to state conclusively that Article 16 conferred a right to treatment upon the inmate found to be mentally ill. *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 167, 350 N.Y.S.2d 889, 893, 305 N.E.2d 903 (1973). It must be concluded that the detailed mechanics established by § 408 of the New York Correction Law have little meaning in the absence of a right of treatment for those who, under its procedures, are determined to be mentally ill. Moreover, it is difficult to rationalize the detailed due process prior to admission with the total absence of discharge procedures and standards.

In this case there has been absolutely no showing of any procedural safeguards whatever antecedent to the terminations of treatment. Furthermore, the facts presented do not support the conclusion that the terminations of treatment in the plaintiffs' individual cases were even substantively in compliance with the standard enunciated in Section 410 of the Correction Law. While an evaluation by the full Matteawan psychiatric staff was given to Cruz before his transfer, the origin and propriety of Cruz's evaluation is suspect. The timing and context of the several pre-transfer evaluations done on the other plaintiffs make it very likely that the results—decisions to transfer—were foregone conclusions in light of the plaintiffs' prior problems with correctional officers.

Furthermore, the requirement that treating physicians and psychologists be charged with the responsibility of determining which of their patients are transferred and which remain in the hospital is a questionable practice. Such a system leads to abuses by both the treating physician and the pa-

tient; either may seek to disguise a recovery or certify one that does not exist for any one of a number of ulterior purposes. The staff physician is under a continuing pressure to "succeed" in his treatment efforts and also must face the complaints of correctional officers about aggressive patients. On the other hand, as the evidence revealed, the doctor may be inclined to tolerate the continued treatment of a recovered patient if that person serves to assist the overall mission of the hospital or has a demonstrated inability to cope with the prison environment. The patient, in turn, may seek to disguise his symptoms and resist treatment if he feels that his physician may one day have to be the cause of a transfer back to prison. Such a specter of an adversarial relationship is no less harmful in the context of a hospital than it is in other similar correctional circumstances. *Cf. Morrissey v. Brewer*, 408 U.S. at 485-6, 92 S.Ct. 2593.

The facts presented in this case also demonstrate that different physicians may have radically different views of both a given inmate's illness and the need for and possibility of treatment of any given mental illness. The evidence further suggests that, in any given transfer decision, wholly extraneous influences may be dispositive factors. Society in general, and New York in particular, has long ago ceased the exploitation and arbitrary abandonment of its disabled citizens. It is no less wrongful for society to arbitrarily dispose of the sick of mind than the lame of body. *Cf. United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969). It is no less wrongful to arbitrarily begin and end a course of treatment for one convicted of a crime than for one who has not been so convicted. *Cf. Estelle v. Gamble, supra*. Treatment is mandated under Section 408 and the New York case law and while Matteawan authorities certainly should be permitted to transfer inmates who are recovered, the manner in which such transfers have been handled in plaintiffs' cases sufficiently demonstrates that the state right to treatment is being arbitrarily abrogated and



that the safeguards provided are not minimally satisfactory under the Due Process Clause of the Fourteenth Amendment.

The State also presented Dr. Jack Wright, Assistant Commissioner of Mental Hygiene, who testified that the methods of treatment at Matteawan had been changed so that team evaluations were used instead of rotating assignments and that the use of a separate evaluation ward was being discontinued. Dr. Wright also described several further reorganizational steps that are planned for Matteawan's population. The planned changes include the operation of six mental health facilities at or near six major correctional facilities and the transfer of responsibility for mental health programs for prisoners to the Department of Mental Health. While the changes described are laudatory and may relieve many treatment shortcomings, they are as yet merely plans for the future and not relief for the plaintiffs' current complaints.<sup>6</sup>

[5] Plaintiffs, based on existing cases prior to the Supreme Court's decision last summer in *Meachum v. Fano*, *supra*, pray for an extensive array of procedural safeguards. However, both parties paid scant attention to the question of what procedural safeguards are appropriate and feasible in the transfer decisions. The Court is reluctant, in such a situation, to limit the administrative options of the Department of Corrections without first allowing the defendants the opportunity to suggest improvements in the procedures presently employed. The preferred course, and the one selected, is to allow the defendants, or their successors in office, the opportunity to construct an administrative process that is in keeping with the fundamentals of the Due Process Clause. It is expected that the procedures established will include, at a minimum: written notification to the inmate of the transfer decision and its factual basis; identification of the decision makers; ending the use of the treatment staff as the sole decision makers; and some type of

professional review which will be free from administrative pressures.

Within sixty days, the defendants shall submit to this Court written guidelines providing all feasible and appropriate procedural safeguards as mandated by the Due Process Clause and this decision.

SO ORDERED.



Michael S. VIRGIL aka Mike  
Virgil, Plaintiff,

v.

SPORTS ILLUSTRATED, and Time, Inc.,  
a New York Corporation, Defendants.

Civ. No. 71-179 GT.

United States District Court,  
S. D. California,  
Fourth Division.

Dec. 17, 1976.

Suit was instituted for invasion of privacy. On interlocutory appeal from denial of defendants' motion for summary judgment, 527 F.2d 1122, case was remanded for reconsideration in light of definition and clarification of applicable law. On remand, defendant sought reconsideration of its motion for summary judgment, and the District Court, Gordon Thompson, Jr., J., held that activities of plaintiff in putting out cigarettes in his mouth and diving off stairs to impress women, hurting himself in order to collect unemployment so as to have time for body surfing at the beach, fighting in gang fights as a youngster, and eating insects, though generally unflattering and perhaps embarrassing, were simply not offensive to a degree of morbidity or sensationalism as would have precluded their publication in defendants' magazine as

6. We are advised that the location and positions of many of the plaintiffs have changed.

Consequently, the matter of individual relief is not being considered at this time.

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

No. 946—September Term, 1976.

(Argued April 6, 1977

Decided June 23, 1977.)

Docket No. 77-7043

---

HECTOR CRUZ, MATTHEW GULLEY, CARMINE PERRELLI, GEORGE  
DUNLEAVY, LOUIS POVEROMO, NICHOLAS PECHAR, and  
GEORGE MITCHELL, individually and on behalf of all  
other persons similarly situated,

*Plaintiffs-Appellees,*

—v—

BENJAMIN WARD, individually and in his capacity as Com-  
missioner of the New York State Department of Cor-  
rectional Services; VITO M. TERNULLO, individually and  
in his capacity as Director of Matteawan State Hos-  
pital; LAWRENCE SWEENEY, individually and in his ca-  
pacity as Chief of Psychiatric Services at Matteawan  
State Hospital,

*Defendants-Appellants.*

---

Before:

KAUFMAN, *Chief Judge,*

LUMBARD and VAN GRAAFEILAND, *Circuit Judges.*

---

Appeal from an order in the Southern District by Judge  
Goettel requiring New York State to provide procedural

4397

EXHIBIT B



safeguards for prison inmates who are involuntarily transferred from mental hospital back to prison.

Reversed.

---

JANE E. BLOOM, Poughkeepsie, New York (Mid-Hudson Valley Legal Services Project (Monroe County Legal Assistance Corp.), Poughkeepsie, New York, on the brief), *for Plaintiffs-Appellees*.

ARLENE R. SILVERMAN, New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Defendants-Appellants*.

---

LUMBARD, *Circuit Judge*:

This is an appeal from a judgment by Judge Goettel of the Southern District holding that New York State has been violating the fourteenth amendment by returning mental patients from hospital to prison without adequate procedural protections. We conclude that the inmates have not been deprived of due process or subjected to cruel and unusual punishment and accordingly we reverse.

I

State prison inmates adjudged in need of institutional care for mental illness are sent to Matteawan State Hospital, which is part of a medium-security facility in Beacon, New York.<sup>1</sup> Although New York law provides elaborate

---

<sup>1</sup> At Matteawan, roughly 300 patients were housed in twelve wards. In 1971 the hospital staff included fifteen psychiatrists; by 1975 the number was seven. Limited psychiatric services were also available at each of the other state prisons. New York's state prison population is approximately 17,000.

procedural protections prior to involuntary transfers from prison to mental hospital, there are no statutory procedures mandated for transfers back to prison.<sup>2</sup> In October 1975 patients and former patients at Matteawan brought a class action alleging that transfers from the hospital back to prison had violated their rights under the due process clause and under state law. That winter, five of the plaintiffs and seven Matteawan physicians testified at four days of hearings. Judge Goettel's findings are set forth in his opinion at — F. Supp.

The transfer decisions are made only after evaluations. An evaluation of each patient at Matteawan is conducted by a staff psychiatrist every month or two. The interview lasts roughly twenty minutes, after which the doctor spends a few minutes writing down his observations and recommendations as to treatment. Although a number of evaluations used to be performed by psychiatrists who had not had any significant prior exposure to the particular patient, since the spring of 1974 it has been the hospital practice

---

Pursuant to recent New York legislation, responsibility for treatment of mentally ill inmates shifted from the department of correctional services to the department of mental hygiene as of April 1, 1977. The new legislation also calls for the establishment of small mental health centers to provide outpatient services at a number of state prisons. N.Y. Corrections Law § 401 (McKinney Supp. 1976).

- <sup>2</sup> Commitments are governed by N.Y. Corrections Law § 402 (McKinney Supp. 1976), which is substantially a recodification of what used to be N.Y. Corrections Law § 408 (McKinney Supp. 1975). If a prison physician believes an inmate is "mentally ill," a judge will appoint two outside physicians to make an independent examination. § 402, ¶ 1. After the examination, five-days notice must be served on the prisoner and on his nearest relative or a friend. Id. ¶ 3. A hearing may be required on behalf of the inmate, and the judge has discretion to examine the inmate for himself. Id. ¶ 5. The person committed also has a right ultimately to a jury trial on the question of his mental illness. Id. ¶ 10. Under § 410 of the old law, a patient could be returned to prison only upon certification by the superintendent of Matteawan that he had "recovered." This purely formal requirement has now been abolished.



for each evaluation normally to be conducted by the ward doctor who has been responsible for the patient's treatment. In some wards, the doctor conducts his evaluations on a team basis, in consultation with other members of the ward staff.

The examiner has access to the patient's commitment papers, reports of previous evaluations, and reports of any major disturbances. It appears that informal notes are sometimes made by treating psychiatrists, correctional officers, social workers, and nurses, but such notes are kept to a minimum for confidentiality purposes and it is not clear that they are ordinarily consulted by the interviewer.

The evaluation procedure is flexible. Sometimes more than one psychiatrist may interview the patient; if the examining psychiatrist has not been the one responsible for the patient's treatment, the treating physician will sometimes set forth his own opinion in a letter. Written recommendations may also be offered by other members of the patient's ward team. Evaluations may be scheduled out of turn if there is some reason why a prompt decision in his case seems desirable.

If the evaluating psychiatrist recommends a return to prison, his report is reviewed by the hospital's chief of psychiatric services, Dr. Lawrence Sweeney. Defendant Sweeney testified that he had personal knowledge of many of the hospital's patients whom he saw on his tours of the wards, and that on occasions he had disagreed with an interviewer's conclusions and had asked for another evaluation.

Although the hospital has no formal written or oral guidelines on when a patient should be returned to prison, the doctors testifying seemed to be in general agreement about the principal criteria. They identified the crucial questions as whether the patient is in contact with reality

and reacts to the world in a rational manner, and whether his condition may be improved through further hospitalization. The borderline cases are patients who are not psychotic but have neuroses, personality disorders, or other psychological problems which some psychiatrists believe are treatable and some not, and which may or may not be aggravated by a return to prison. Several of the doctors testified that because of uncertainties in following up on patients after their return to prison and concern about the destructiveness of the prison environment, they tend to let borderline patients stay on at Matteawan somewhat longer than would otherwise be medically mandated. However, if such a patient becomes disruptive and potentially dangerous to other patients and hospital personnel, or if he tries to take advantage of the relatively low security at the hospital in order to escape, the doctors may conclude that it would be better for him to be back in prison where he can be more readily controlled. Thus, if a patient's involvement in a fight is considered not to be a symptom of mental illness, it can result in his being transferred to prison.

Relying primarily on their own experiences, the plaintiffs contended at trial that a number of transfer decisions were being made arbitrarily, out of spite, or simply as punishment for misbehavior. Plaintiffs Gully and Cruz were first admitted to Matteawan in January 1974 after attempts at suicide. Plaintiff Poveromo was admitted in September 1974. Gully and Poveromo were returned to prison shortly after they were involved in a fight in their ward in January 1975. Within a few weeks (during much of which time they were confined in stripped cells), the prison authorities sent them back to Matteawan. Gully and Cruz were involved in another fight in October 1975, and after the incident they were evaluated by a group of six staff psychiatrists while in restraining sheets, and thereafter returned to prison.



Plaintiff Dunleavy arrived at Matteawan in April 1974. A year later, and six weeks after a brief escape from the hospital, he was returned to prison. Within a month, he slashed his wrists and was returned to Matteawan.<sup>3</sup>

Plaintiff Mitchell arrived at Matteawan in September 1974. On October 10, 1975 he was evaluated by a staff psychiatrist who diagnosed him as recovered. When told by a corrections officer that he was to be transferred back to prison, Mitchell "went beserk" and had to be placed in a strait jacket. According to Mitchell's testimony, he attempted suicide several times while waiting to be returned to prison, but the transfer was nevertheless carried out. After two weeks at prison, he was returned to Matteawan.

The district court concluded that the procedures being followed to protect patients' right to treatment were unsatisfactory.<sup>4</sup> Judge Goettel found that the decisions to transfer the plaintiffs had "very likely" been "foregone conclusions in light of the plaintiffs' prior problems with correctional officers." He determined that, at a minimum, due process must include written notification to the inmate of the transfer decision and its factual basis, identification of the decision-makers, and review of the transfer decision

<sup>3</sup> According to an article in *The New York Times* on May 22, 1977, at page 35, Dunleavy has again escaped from Matteawan, along with Poveromo and numerous other prisoners.

<sup>4</sup> In a similar case, *Burchett v. Bower*, 355 F. Supp. 1278 (D. Ariz. 1973), the district court reached basically the same result as that reached by the district court here. Pretransfer procedures were also required by the court in *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974) (three-judge court), but that case is distinguishable since (1) it involved transfers to prison of mental hospital patients who had never been sentenced to prison and (2) the transfers were based not on a finding that the patients no longer needed treatment but rather on a finding that they were so insane as to be too dangerous for continued confinement at the hospital.

by a professional who is not a member of the hospital staff.<sup>5</sup>

## II

We disagree with the district court's assessment of the requirements of procedural due process and conclude that no violation has been demonstrated in this case.<sup>6</sup> Nor do we think the plaintiffs have suffered cruel and unusual punishment.

The ingredients of due process depend on the interests at stake and the nature of the issues to be resolved. See generally Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510, 1514 (1975). Due process does not require formal hearings and inflexible guidelines under all circumstances. See *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 894-95 (1961); *Haymes v. Regan*, 525 F.2d 540 (2d Cir. 1975).

5 For purposes of framing injunctive relief, Judge Goettel has asked the defendants to submit proposed procedures to him. We need not reach the question whether his decision as it stands at present is appealable as a final order, see generally *Arthur v. Nyquist*, No. 76-7292 (2d Cir. Nov. 8, 1976); *Hart v. Community School Board*, 497 F.2d 1027, 1031-32 & n.4 (2d Cir. 1974), since certification and leave to appeal under 28 U.S.C. § 1292(b) have been granted.

6 In reaching its decision, the district court interpreted New York law as granting prison inmates a right to adequate psychiatric treatment. Cf. *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 167, 350 N.Y.S.2d 889, 893 (1973), rev'g 39 App. Div. 2d 410, 334 N.Y.S.2d 738 (1972); *Dunleavy v. Wilson*, 397 F. Supp. 670, 673 (S.D.N.Y. 1975). Appellants take issue with this finding, and they argue that inmates who have no legally protected liberty or property interest in receiving psychiatric treatment are not entitled to due process prior to the termination of their hospital stay, see *Meachum v. Fano*, 427 U.S. 215 (1976). Appellees defend the district court's interpretation of New York law and contend that, in any event, the right to procedural due process is triggered by a prisoner's eighth amendment entitlement to adequate medical care. Since we find the state's existing procedures to be constitutionally adequate, we do not reach any of these other questions.



[I]dentification of the specific dictates of due process generally requires consideration of . . . the private interest that will be affected . . . , the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional . . . procedural safeguards, and, finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Another constraint on state actions affecting the health of prisoners is the prohibition against cruel and unusual punishments. Because an ill inmate must rely on his warder's aid, the state has a duty to supply him with medical care. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Deliberate indifference to a prisoner's serious medical needs violates the eighth amendment. *Id.* at 103-06. Such indifference may occur on an individual level, such as when a doctor intentionally mistreats an inmate, see *id.* at 104 n.10, or on an institutional level, when the prison's system of medical care is so seriously inadequate as to cause unwarranted suffering, see *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974); *Todaro v. Ward*, 74 Civ. 4581 (S.D.N.Y. April 26, 1977).

In the present case, the record does not support a finding that transfer decisions have been made in bad faith, out of pique, or on irrational grounds. Proof that a few patients who were transferred from the hospital were returned to it shortly thereafter does not mean that these patients have been unfairly treated. No psychiatrist is a clairvoyant; some diagnoses that are perfectly defensible at the time will, in retrospect, turn out to be erroneous. Also, since many psychological judgments are highly sub-

jective, it is to be expected that prison physicians should sometimes disagree with the opinions of the hospital staff.

Although it would clearly be cruel and unusual to deprive a patient of needed psychiatric care simply in order to punish him for misconduct, the record in this case does not indicate that the transfers were punitive. A few inmates who had been at the hospital for a number of months and whose need for continued hospitalization was considered questionable were transferred to prison shortly after they became embroiled in fights or attempted to escape. When an inmate abuses in this manner the relative freedom afforded him in the hospital environment and threatens the welfare of other patients and hospital personnel, it is clearly appropriate for the staff to reassess his mental condition in order to determine whether continued treatment at the hospital is truly necessary for him or unduly hazardous to others. Thus, it would be too speculative for the district court to presume that these particular transfer decisions were punitive or otherwise contrary to reasonable medical standards.

The nature of the medical judgments involved in this case and the context in which they are made render them peculiarly unsuited to procedural structuring by a court. Compared with other fact-finding processes, the practice of psychotherapy is highly subjective. Since two qualified psychotherapists examining the same patient can reach different conclusions as to malady and cure without either conclusion being demonstrably incorrect, diagnostic consensus is an elusive and sometimes illusory goal. The decision to dehospitalize an inmate is made by a trained physician who is involved in the day-to-day treatment at the hospital, and it is reviewed by the hospital's chief psychiatrist. Under these circumstances, the marginal value of a third professional opinion seems questionable. The arguments in favor of requiring review by outside



parties are weaker here than in the commitment context, cf. *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969), since here the patient has been subject to protracted observation by the hospital treatment staff. In making their evaluations the doctors have recourse to the records of prior evaluations which have accumulated over the course of the patient's stay; in most cases, they will have participated in the patient's treatment. Thus, they are in an especially good position to reach an informed conclusion about the patient's condition. In addition, keeping the evaluation process flexible and informal may enhance the opportunities for input from other staff members.

A statement of reasons and assistance of counsel prior to transfer might do more harm than good. These safeguards, designed for traditional fact-finding and dispute resolution, are much less functional where the issue is whether a doctor thinks his patient requires further treatment. There is also a danger that both these devices could prove to be antitherapeutic in many cases. Moreover, too much concern about precedent may interfere with the effective exercise of administrative and medical discretion. For example, the hospital appears to have the capacity to allow a few patients like plaintiff Dunleavy to stay on beyond their normal return dates simply because they are happier at the hospital and they serve a useful liaison function with the other patients; however, if forced to formalize this transfer policy, the hospital might be hard-pressed to devise a workable rule. Finally, in view of our concern about unnecessary hospitalization for mental illness, see, e.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *United States ex rel. Schuster v. Herold*, *supra* at 1078-79, 1087, we should hesitate before erecting additional procedural obstacles to stand in the way of the termination of such hospitalization.

We also have trouble with the district court's requirement that in every case the inmate be given notice of his impending transfer. A possible problem with advance notice is that an inmate who knows he is about to be returned to prison may, in the words of defendant Sweeny, "go back to his ward and blow his stack and get everybody else upset." Whether such notice would substantially enhance the decision-making process or ease the trauma of adjustment for the transferred inmate is a matter of conjecture. Clearly, however, the pros and cons of notice policy are a subject that is better left to the judgment of the doctors at the hospital.

The proposal that the hospital be required to promulgate guidelines suffers from similar infirmities. Since the basic criteria already being applied by the doctors seem fairly sound and uniform, see pages 4400-4401 *supra*, we doubt that written guidelines will serve much point. On the other hand, discouraging minority views among the staff may in some circumstances be harmful; formal guidelines may carry with them the evils of rigidity. Thus we conclude that the net benefits which might accrue from these additional procedural safeguards are much too uncertain to warrant a finding that their implementation is mandated as a matter of due process.

Accordingly, the order of the district is reversed and the case is remanded with instructions that plaintiffs' complaint be dismissed.<sup>7</sup>

---

<sup>7</sup> Appellees contend that inmates have been returned to prison because of their involvement in organizational activity and litigation. The only testimony regarding any alleged first amendment violations, however, was that one staff psychiatrist told plaintiff Dunleavy he might be transferred if he continued to be involved in litigation. As Dunleavy has remained both in this law suit and in the hospital, it seems clear that any threat against him has not chilled the exercise of his rights and has not been carried out. Accordingly, we do not think the record supports appellees' request for a remand on this claim.



KAUFMAN, *Chief Judge* (dissenting):

With all due deference to my colleagues, the majority opinion has glossed over the clear implication of the record that responsible officials at the Matteawan State Hospital have regularly returned mentally ill patients to prison for punitive reasons, to languish in solitary confinement without even a semblance of medical care. Reasoning on the basis of a critical and unwarranted factual misapprehension, my brothers conclude that the State of New York need not adopt standards and minimal procedural safeguards to assure in the future that decertification is recommended solely for medical reasons. I believe that the opinion signals an unfortunate retreat from hard-won judicial recognition of important human rights. Accordingly, I dissent.

I.

The majority opinion all but ignores the factual findings of the district court. Judge Goettel, after conducting four days of hearings at Matteawan State Hospital for the Criminally Insane and in New York City, specifically found that "the facts presented do not support the conclusion that the terminations of treatment in the plaintiffs' individual cases were even substantially in compliance with the standard enunciated in Section 410 of the Correction Law.<sup>1</sup> — F. Supp. — (S.D.N.Y. 1976). Judge Goettel

<sup>1</sup> The statute provides, in relevant part

Whenever any prisoner, who shall have been confined in such hospital as an insane person, *shall have recovered* before the expiration of his sentence, and the superintendent shall so certify in writing to the agent and warden or other officer in charge of the institution, from which such prisoner was received or to which the commissioner of correction may direct that he be transferred, such prisoner shall forthwith be transferred to the institution from which he came by the superintendent of the hospital, or if received from one of the state prisons, to such state prison as the commissioner of correction may direct; and the warden or other officer in charge

also found that the decisions to transfer the appellees to harsh prison conditions "were foregone conclusions in the light of the plaintiffs' prior problems with correctional officers." *Id.* Citing the incessant pressure on staff physicians to prove success by certifying "recovery" and, in addition, to mollify beleaguered hospital guards who complained of assaultive patients, the district court held that the appellees' constitutional rights had been arbitrarily abrogated and that existing safeguards against punitive transfers were not even minimally satisfactory. Putting aside the deference traditionally accorded the district judge, who is in a superior position to evaluate credibility, *cf. United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), a fair reading of the record provides ample support for his conclusion that the transfers at issue here were vindictively motivated.

In 1968 Matthew Gulley was imprisoned at Attica Correctional Facility under a ten-year sentence.<sup>2</sup> Beset by hallucinations and the victim of several suicide attempts, Gulley was admitted to Matteawan in 1974. He was diagnosed as a psychotic with borderline mental retardation. Treatment included prescriptive medication, psychological counseling and monthly psychiatric evaluations. From the

---

of such institution shall receive such prisoner into such institution, and shall, in all respects, treat him as when originally sentenced to imprisonment.

N.Y. Correction Law §410 (emphasis supplied).

<sup>2</sup> The fact that parole release is rarely, if ever, granted inmates of Matteawan appears to undercut the argument that Gulley, after serving nearly two-thirds of his maximum term, was a "malingerer" whose only goal was to remain incarcerated in the relative "luxury" of the hospital. Moreover, it is undisputed that the vast majority of prisoners assiduously strive to avoid the stigma of being declared insane. This understandable desire, of course, is the genesis of the legion of judicial decisions affording procedural due process in commitment determinations. *See e.g. U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 874 (1969).



beginning, the hospital staff considered him a disciplinary problem. In January, 1975, soon after Gulley was observed fighting with another inmate, Dr. Seymour Feldman noted that it might be necessary to return Gulley to a regular prison facility if he persisted in his belligerence. Dr. Lawrence Sweeny, Chief Psychiatrist at Matteawan, apparently concurred in this appraisal of the proper course of treatment, for after Sweeny evaluated Gulley on February 13, and 14 the appellee was transferred without notice to Clinton Correctional Facility where he was confined in a "stripped cell"<sup>3</sup> for 24 hours a day without medication or adequate professional assistance.

In just two weeks, Gulley was recertified from Clinton to Matteawan where he resumed his former regimen of medication and regular psychiatric guidance. In July, 1975 the hospital authorities secured a retention order.<sup>4</sup> On October 9, a staff psychiatrist, after a scheduled evaluation, recommended still further retention of Gulley. But eight days later, Gulley engaged in a violent altercation and because of it was placed in a restraining sheet in the jail ward. On October 20 an *ad hoc* committee of staff psychiatrists—in a clear breach of the institution's custom and practice—"evaluated" Gulley for three minutes while he was still confined in a restraining sheet and pronounced him recovered. Cf. N.Y. Corrections Law §410. This diagnosis, not surprisingly, contradicts a written psychiatric evaluation of the same date, which notes:

3 The stripped cell at Clinton is a windowless room, devoid of all furnishings except a sink, toilet and mattress. The only clothing permitted a prisoner is a pair of underwear.

4 Dr. Sweeny testified that he was required to seek a retention order every six months to prevent the automatic return of a patient to the general prison population. Unless the prisoner acquiesced in retention at Matteawan, hospital officials were required to support their application in an adversary proceeding pursuant to N.Y. Correction Law §408.

The patient was last evaluated on October 9, 1975. Since then his condition seems to be the same except on one occasion he was involved in an unpleasant incident.

Gulley's final diagnosis was "borderline mental retardation, personality disorder."

Louis Poveromo was imprisoned at Greenhaven Correctional Facility when, in September, 1974, he was adjudged mentally ill and transferred to Matteawan for treatment. Upon his arrival there Poveromo was diagnosed as psychotic and drug dependent. The court granted an official request for retention in January, 1975. Later that same month the appellee was involved in a fight with correctional officers and immediately thereafter branded a "troublemaker" for whom Matteawan had "no more to offer." This resulted in invocation of the talismanic word "recovered" and a nine day stint in the stripped cell at Clinton, after which Poveromo was again returned to Matteawan. Swift recertification in this instance was to be expected, however, since a staff psychiatrist had recommended retention and further treatment of Poveromo only two days before he was transferred to Clinton.

A familiar and similar pattern of retribution for aggressiveness and deliberate withholding of desperately needed medical attention is evident in the cases of Hector Cruz, George Mitchell and George Dunleavy. Cruz was admitted to Matteawan in January, 1974 after he tried to hang himself, and was diagnosed as "schizophrenic, residual type." On September 17, 1975 a staff psychiatrist concluded, after a regularly scheduled evaluation, that Cruz required further hospitalization. One month later he was involved in an altercation on his ward. A perfunctory evaluation by six psychiatrists on October 20 revealed that Cruz had "recovered," although his final diagnosis dis-



claims any change in his schizophrenia. Mr. Mitchell's case followed the same formula. He was transferred out of Attica where he had been "hearing voices and seeing visions." Following a fracas, Mitchell was informed of the decision to remove him from Matteawan, and "went berserk." He was led to the hospital's Transfer Unit in a strait jacket. Despite two subsequent suicide attempts and a contrary recommendation from the psychiatrist most familiar with his condition, Mitchell was sent to Clinton. After two weeks there he was recertified to Matteawan. Dunleavy, according to the testimony of Dr. Ali Sirman, is merely neurotic, a fact in which the majority apparently finds solace for its unfounded innuendo that all of the appellees are malingerers. In any event, it is undisputed that Dunleavy attempted to commit suicide by slashing his wrists after he was transferred to Greenhaven Correctional Facility as punishment for an unsuccessful effort to escape the "comforts" of Matteawan. Thereafter, Dunleavy was recertified to the hospital, whose staff requested a retention order in November, 1975.

Further evidence confirming the existence of an almost sadistic propensity to shuttle unruly inmates between Matteawan and the stripped cells of the state's prisons can be elicited from the testimony of several staff psychiatrists. In response to the court's inquiry whether it was standard procedure to reevaluate a patient who was involved in an assault on correctional personnel, Dr. Feldman stated that "it is not standard procedure. It is one hundred percent." Dr. VicArthur Factora acknowledged that he regularly considered whether a patient engaged in altercations in arriving at a decertification recommendation. With all due respect for my able brother Lumbard's concern not to meddle in highly subjective medical judgments, we can neither ignore nor condone the overwhelming weight ac-

corded to clearly non-medical factors in the dehospitalization decisions before us.

The district court was aware of the "insoluble dilemma" posed by assaultive prisoners so long as standards for decertification did not exist. The record is clear that prison authorities have little difficulty convincing two physicians that incorrigible inmates are incompetent and in need of hospitalization; and Matteawan officials seem to be equally adept at shuttling human beings back to prison because their aggressive violence evidences "recovery". This roundelay, of course, often can result in the cruel injustice portrayed in the instant case, where persons like Mitchell, desperately in need of psychiatric treatment, are condemned to solitary confinement where their medical needs are callously ignored. Or, to quote Dr. Feldman:

This is known as passing the buck. It is a very common thing . . . and unfortunately, we have it to an extraordinary degree.

## II.

I do not understand my brothers to disagree that the appellees have a constitutionally protected interest in remaining at Matteawan until they are psychologically fit to return to the general prison population. Indeed, the majority is compelled to this view by state law, which forbids reimprisonment of inmates who have not "recovered," N.Y. Corr. Law §410, *cf. Kesselbrenner v. Anon.*, 334 N.Y.S. 2d 738 (2d Dept. 1972), *rev'd on other grounds*, 350 N.Y.S. 2d 889 (1973); *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969), and by the Eighth Amendment proscription of wanton indifference to a prisoner's medical needs. *Estelle v. Gamble*, 45 U.S.L.W. 4023 (1976).<sup>5</sup> Therefore, my colleagues' inex-

<sup>5</sup> The Supreme Court has instructed us that an inmate does not ordinarily enjoy a constitutionally cognizable interest that will prevent his



plicable belief that due process was accorded the appellees must be based upon their failure to give credence to Judge Goettel's amply supported factual findings which make out a plain case of deliberate, punitive transfers of mentally ill human beings.

I understand my brothers' reluctance to question the professional judgment of psychiatrists. Nevertheless, until now, courts have not been dissuaded from investigating a possible denial of due process simply because a doctor or psychiatrist is involved. Surely it is too late in the day to argue that a mere unarticulated medical judgment, without a written statement of reasons that can withstand judicial scrutiny, is sufficient to support a decision to commit a prisoner to an insane asylum. *Cf. U.S. ex rel. Schuster v. Herold, supra*. We cannot blind ourselves to the deplorable condition of many mental hospitals and the shocking practices revealed in the record before us. When one of the staff physicians at Matteawan testifies that only a uniform "manual of procedures" will prevent further proliferation of the "slipshod" practices that ensue from the unstructured exercise of individual discretion, it surely will not do for a federal court to rely upon "professional judgment" without more.

I also emphatically disagree with the majority's bland assessment that a mere vague "general agreement about the principal criteria [for recommending return to prison]" is an adequate substitute for clear guidelines. Rather, I

---

transfer from prison to prison absent some right or expectation rooted in state law. *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976). The majority, by addressing the question whether the instant system of transfers without hearings or other procedural safeguards resulted in the arbitrary abrogation of a state created right to treatment, see *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Wolff v. McDonnell*, 418 U.S. 539 (1974), recognizes that due process requires some protection for potential transferees.



would credit the expert testimony of Dr. Jack Wright, the Assistant Commissioner for the New York State Department of Mental Hygiene currently charged with improving services at Matteawan, that it is possible to articulate medically acceptable and reasonably objective decertification factors. Only by removing the secrecy that shrouds decisions to dehospitalize prisoners can we hope to avoid repetition of the crass injustice uncovered in the instant case.

My colleagues' concern impels me to address the question of the remedy to be afforded mentally ill prisoners whose constitutional rights have been flouted. I agree that we should avoid a "battle of psychiatrists." Nevertheless, I believe that the punishment of unruly mental patients by systematic transfers to stripped cells where they are deprived of desperately needed medical attention—as specifically found by Judge Goettel in this case—cannot be eradicated or even reduced in the future without a minimum of intrusion by the federal courts. I do not believe it would be unduly vexing for the State to propound a set of guidelines delineating the type of inmate who would benefit from Matteawan, and the purposes that the institution seeks to achieve. Such guidelines would, of course, include a statement of permissible and impermissible grounds for transfer to prison. I certainly would not consider it improper for the State of New York to declare that positively incorrigible and dangerously violent inmates who interfere with the treatment of others need not be housed at Matteawan. On the other hand, I should think that a direction to transfer a mildly aggressive person to solitary confinement without medication, particularly by an annoyed and irritated prison official, is clearly improper.

I would also require at a minimum that the treating physician who makes the transfer decision state in writing



his reasons for it and his factual basis. I do not believe that this statement of reasons need be analyzed or approved by an outside physician. I would merely propose that the statement be placed in the transferee's file for later administrative review. This will be the crucible for testing the good faith of the staff psychiatrist. Review, of course, may be had in a state Article 78 proceeding if the inmate claims an abuse of administrative discretion. As long as the appropriate procedural rules were followed, Section 1983 would be available only when utter disregard for the transferee's legitimate medical needs could be shown—as in the instant case.

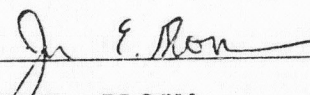
### III.

Federal courts, quite properly, are reluctant to interfere with the operation of state prisons. Nevertheless, the meager funds of a state's treasury and a state's pride in its autonomy will not excuse trampling underfoot the constitutional rights of its citizens. There are some powers that a state may not retain; there are some economies that a state may not demand. We will not blithely intrude on the state's preserve. But, once a constitutional violation has been convincingly established, we are required by the Constitution to overcome our timidity. I believe we should do so here.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK      ss.:  
COUNTY OF DUTCHESS

JANE E. BLOOM, being duly sworn, deposes and says that on March 30, 1977, I served a copy of the foregoing Petition For Rehearing by mailing in the United States mail, postage prepaid, a true and correct copy of same to the attorney for Defendants-Appellants, Arlene Silverman, Assistant Attorney General, State of New York, Department of Law, Two World Trade Center, New York, New York 10047

  
JANE E. BLOOM  
Attorney for Plaintiffs-Appellees  
MID-HUDSON LEGAL SERVICES, INC.  
50 Market Street  
Poughkeepsie, New York 12601  
(914) 452-7911

Sworn to before me this  
7<sup>th</sup> day of July, 1977.

  
NOTARY PUBLIC  
BARBARA K. PARMENTER  
Notary Public in the State of New York  
Residing in Dutchess County  
Commission Expires March 30, 1978